Supreme Court, U. S.
FILED
JUN 4 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term, 1979

No. 78-1806

G. T. BRANDON and
BRANDON BROTHERS USED CARS, INC. - Petitioners

versus

UNITED STATES OF AMERICA - - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

E. W. RIVERS
Suite 801
Citizens Bank Building
Paducah, KY 42001

Attorney for Petitioners

WESTERFIELD-BONTE CO., 819 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

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The Petitioners, G. T. Brandon and Brandon Brothers Used Cars, Inc., request that the Writ of Certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit rendered in these proceedings on May 3, 1979.

1(a)

The opinion of the Court of Appeals was rendered on May 3, 1979 and is unreported.

1(b)(i)

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on May 3, 1979 and it is final by its terms.

1(b)(iii)

The jurisdiction of this court is invoked under the provisions of Title 28 USCA Section 1254(1).

1(c)

In December, 1976, the Grand Jury was conducting an investigation under the odometer law, Title 15 USCA Section 1984, 1990(c). The Grand Jury was scheduled to meet on December 13, 1976 and subpoenas were issued for about six wholesale used car establishments in Calloway County, Kentucky. FBI agents were to serve the subpoenas. The subpoenas called for hundreds of documents, which were to be presented to the Grand Jury that day. There was also a letter addressed to Petitioner, Brandon, and the corporation, which read that pursuant to an official criminal investigation of suspected violations of the federal law, being conducted by the Grand Jury in Western Kentucky, and that they were served with a forthwith subpoena. Agent Bishop went into the office and served the Petitioner, Brandon. He was not advised of his rights. Another agent, Houston, went on the lot where the office was and checked the identification numbers on some cars and the odometer readings on the cars. The odometer readings on three automobiles on the lot resulted in the indictment of the Petitioner for altering the three odometers. At no time was Petitioner, Brandon, the President of the corporation, advised of his rights. Agent Houston never obtained the consent

of the Petitioner to obtain the odometer readings. The question presented is:

(1) Were the FBI agents required to have a search warrant before searching the cars on the Petitioner's property?

The Grand Jury subpoenaed the records of Brandon Brothers Used Cars, Inc., and Brandon, as President, was subpoenaed by the Grand Jury to produce the corporate records. Brandon appeared before the Grand Jury on December 13, 1976, December 15, 1976 and December 16, 1976. He answered questions as to the documents presented and took the fifth amendment at various times throughout the interrogation by the government. An order to show cause was issued against Petitioner, Brandon, and a hearing was held on January 19, 1977. At that time, the court ruled in an opinion and order (EX-1) wherein the court ordered that six questions were to be asked by the government of the Petitioner, Brandon. The order provided that only the six questions shall be answered by the Petitioner and none others. The order further provided, that the Petitioner shall not be required to answer any questions pertaining to individual entries made on any documents, which are produced to him. A subpoena, dated January 14, 1977, requested documentation as to the list of cars which the government agents had inventoried on the Petitioner's property on December 13, 1976. Before the Grand Jury, the prosecution departed from the six questions directed to be asked by the court and asked some thirty pages of questions,

which did not relate to the six questions ordered asked and answered by the court. Brandon was questioned about the very documents relating to the three automobiles for which he was indicted; about entries on those documents and about Jackie Brandon, to whom the Petitioner had sold the automobiles quite some time before the search on December 13, 1976. The question is:

> (1) Should the evidence, and the fruits thereof, given by Petitioner, Brandon, before the Grand Jury, to questions prohibited being asked by the court, be suppressed and not be admissible at the trial of his case?

1(d)

The fourth amendment of the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The fifth amendment of the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or

public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

1(e)

On May 15, 1978, the Grand Jury at Paducah, Kentucky, returned a three count indictment against the Petitioners. They were charged in count 1 with altering the odometer on a 1974 Oldsmobile, in order to change the number of miles indicated thereon approximately 104,469 miles to 44,774 miles. Count 2 charged them with altering the odometer of a 1972 Oldsmobile, with the intent to change the number of miles indicated thereon from 100,651 to 48,010. The third count charged the Petitioner with altering a 1975 Oldsmobile odometer with intent to change the number of miles thereon from approximately 49,087 to 29,397. The Petitioners were found guilty under counts 1 and 2, but were acquitted on count 3.

The Petitioners had been in the wholesale used car business for some 28 years. Prior to 1976, Petitioner had bought and sold between 1,000 and 1,200 cars a year. He was getting up in years and was required to be on the road a lot, away from home, attending auctions and buying and selling cars. In 1976, he decided to slow down and stay off the road and spend more time with his family. He had known Jackie Brandon for about 45 years and he was a distant cousin. Bran-

don testified that he made an arrangement with Jackie Brandon to the effect that when the Petitioner purchased an automobile, Jackie Brandon would pay him a hundred dollars over what is called the invoice price or whatever Brandon paid for the car plus the Petitioner's expense in bringing the car to Murray and cleaning up the car. This agreement involves the three Oldsmobiles that are the subject of the three counts in the indictment.

The Petitioners bought automobiles from various wholesale dealers, leasing companies, car rental agencies throughout the United States. The three automobiles in question were purchased by the Petitioner from Royal Auto in Birmingham, Alabama. Royal Auto, through its President, Mr. Newby, when it had cars, would call the Petitioner at Murray, Kentucky and describe the particular car he had and what he wanted for it and what repair work would have to be done. Newby would record that in his office along with the date of sale, the price, the mileage and so forth. The Petitioner would send a bank draft to Royal, which was in an envelope and when Royal got the title papers, they would forward the title papers along with the bank draft to Petitioner's bank at Murray, Kentucky. After the telephone conversation, Brandon's independent contractors, would go from Murray, Kentucky to Birmingham, Alabama and bring the cars back to Murray, Kentucky. As soon as the cars were received on the lot, the Petitioner would inventory the cars, take the odometer mileage readings and the vehicle identification numbers and make sure it was the car he had

purchased. He would then call Jackie Brandon, to whom he had already sold the car, who would then or at a later date, pick up the car and have what mechanical repairs were needed performed on the car. He would return the car to the Petitioner's lot and the Petitioner would do the clean up work on the automobile, namely the paint, upholstery and anything that was needed to be done to the car to put it in good condition, except the mechanical and body work, which Jack Brandon had performed by himself or other people. The three Oldsmobiles in the three counts of the indictment were on Petitioner's property on December 13, 1976, when the agents inventoried the cars and checked the odometer readings. The Petitioner had picked up the cars and actually sold them before receiving the title papers and odometer statements from Royal Auto in Birmingham, Alabama. None of the title papers nor did any of the checks or drafts clear the Petitioner's bank at Murray, Kentucky until after December 13, 1976. They were subsequently picked up and removed from the Petitioner's premises by Jackie Brandon, when the title papers arrived. The evidence and checks were introduced to show that Jackie Brandon had paid for each of the three automobiles.

Under federal law, the seller or transferor of an automobile in the automobile business is required to give an odometer statement. The Petitioner's odometer statements on all three of the automobiles showed the correct mileage. They showed the same mileage as was recorded at Birmingham, by Royal Auto, in addition to the 330 miles from Birmingham to Murray,

Kentucky, the distance traveled by the cars. The Petitioner gave Jackie Brandon an odometer statement for each Oldsmobile in the indictment which showed the correct mileage on the car on the date of its arrival at the Petitioner's lot in Murray, Kentucky. Jackie Brandon signed as the transferee on each odometer statement. His signature was identified on the odometer statements and on the checks that he had given the Petitioners for the automobiles by the banker that Jackie Brandon did business with in Murray, Kentucky. It was established at the trial of the case, that Jackie Brandon was involved in an automobile accident with the Oldsmobile, which is the subject of count 3. This occurred on December 6, 1976, prior to the search by the agents on December 13, 1976. Jackie Brandon was listed as the owner on the police report and he filed a claim against the other car's insurance company and was paid for the damage to the 1975 Oldsmobile, even though title papers had not been transfered nor had Jackie Brandon paid for the car as of that time. Jackie Brandon returned the wrecked Oldsmobile to Petitioner's lot where it was inventoried by the FBI and had the altered mileage on the odometer. This was the course of dealing followed by Petitioner with their dealings with Royal Auto, and other wholesale car dealers and with Jackie Brandon. Jackie Brandon was subpoenaed by the Petitioners at the trial, but was unable to be found and did not appear.

The Petitioner is a wholesale used car dealer and not a retail used car dealer. It was the government's

contention throughout that the Petitioner was a retail used car dealer. The Petitioner had a wholesale car license and a retail car license issued for one person, which was to the Petitioner. The Petitioner buys cars from dealers, leasing companies, and they are brought to his place of business, where they are cleaned up, waxed, polished, upholstered and put in excellent condition. Some of the cars are sold to wholesale dealers, who come to his office. Most of them were taken to auctions. The only time he sells a car retail is to some friend and he has never sold over four or five cars a year retail. Petitioner does not have any salesmen selling cars off of the lot and has but one bookkeeper and three employees, who are engaged in the clean up work on the automobiles. The Petitioner's lot is not open to the general public and they have never been allowed to come on his lot or in his garage. If a member of the general public wanted to buy a car at retail, the Petitioner would refuse them, since he was not interested in the retail business, which involved financing, warranties and other paper work, which was not involved in the wholesale business.

1(g)

The jurisdiction of the United States District Court for the Western District of Kentucky at Paducah, Kentucky, is conferred by Title 18 Section 3231.

1(h)

The Court of Appeals disposed of the Petitioner's Fourth Amendment claim summarily. The Court

stated that the agent's testimony was undisputed and it was to the effect that they entered the used car lot, looked at the automobiles, and were never asked to leave or forbidden to look in the windows and that this was a commercial establishment open to the public. The facts are that the Petitioner did not know that FBI agent, Houston was on his premises taking odometer readings and identification numbers from the cars. Brandon was inside the office talking to FBI agent, Bishop, who was delivering the subpoena and letter and consequently had no opportunity to ask Houston to leave or quit taking the odometer readings or VIN numbers. Agent Houston's testimony was that he could get the VIN numbers from looking through the windshields and the odometer readings from looking through the windows and that he does not remember if he opened the doors of the cars to get the odometer readings or not, because he thought they were locked, but he was not positive. Other testimony was to the effect that you can't get odometer readings from simply looking through the window without opening the car doors. It was brought out on cross-examination that Houston would have had to open some doors to get the VIN numbers and the odometer readings. This was especially true of vans. The court cited the case of Caldwell v. Lewis, 417 U. S. 583, 590 as authorizing the search of the automobile. The Caldwell case went up to the Supreme Court from the Sixth Circuit and this court held that an exterior search of an automobile on a public parking lot was not unreasonable under the fourth and fourteenth amendments. The court held

that no expectation of privacy was violated by the examination of tire on operative wheel or in taking of exterior paint samples from the vehicle which had been parked in a public place. The immediate case does not involve an exterior search, but a search conducted on the premises which were not commercial. True it was a business, but it was a business where the general public was excluded and was not the ordinary run of the mill retail used car lot that are so prevalent. The Petitioner only dealt with wholesalers and not the persons wishing to buy automobiles at retail.

In Katz v. U. S., 389 U. S. 347 at 350, 88 S. Ct. 507, this court held that what a person seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. The case of Wattenburg v. U. S., 388 F. 2d 853 (1968) (9th) presents a very similar fact situation. In that case, Defendants were convicted for conspiring to conceal about a hundred christmas trees which had been taken from the U. S. The evidence shows that the trees were cut and were taken to the premises known as Hide-a-way Lodge. The distance between where the trees were stockpiled and the lodge was from 20 to 35 feet and the stockpile was about five feet from the parking area used by personnel and patrons of the lodge. Wattenburg operated and lived at the lodge and the other Defendant, Owens rented a room there, which he sometimes occupied. Government agents conducted a search on these premises and obtained cuttings from trees which matched the stumps on the government land and a paint smudge on one of the trees which matched that

of the vehicle that transported them. The government contended that the search was good under the "Open Fields Doctrine". The Ninth Circuit held that there was no difficulty in holding that the trees were within the curtilage, but the court went on to hold that it seems to be a more appropriate test in determining if a search and seizure adjacent to a house is constitutionally forbidden is whether it constitutes an intrusion upon what the resident seeks to preserve as private. Even in an area, although adjacent to his home, accessible to the public, the court held the search was illegal and the evidence was suppressed. The christmas trees were stockpiled so close to the lodge, which rented rooms to patrons, who used the lodge and the parking lot, that it was protected from a warrantless search. The automobiles in this case were adjacent to the office of the Petitioners and all the evidence was to the effect that it was not a business open to the public in general and was not there for commercial in the sense that the Sixth Circuit used the word. The motion to suppress the odometer readings from the three Oldsmobiles should be suppressed, since it was a search conducted without a warrant on the Petitioner premises.

The court dismissed the Petitioner's claim of abuse of the due process clause and held that this case disclosed no such due process abuse as was involved with U. S. v. Doss, 563 F. 2d 265 (6). In the Doss case, the indictments were dismissed for the reason that the Defendant, who had been secretly indicted by sealed indictments, was called before the Grand Jury that

indicted him and was questioned about the offenses in the indictment. The court held that this was a violation of the fourth and sixth amendment of the constitution and dismissed the indictments. The Court, in the case now before the court stated that it could not ascertain *any prejudice involved in his answers to the six questions which the district court required him to answer.* (Italics ours.) The Petitioners never objected to being asked these six questions nor did the Petitioners claim any prejudice by reason of answering these six questions. The Petitioners contend that the some thirty pages of questioning by the prosecutor, which in no way related to the six questions, violated his fifth amendment privilege in incriminating himself and prosecutor's actions and questions violated the due process clause of the fifth amendment. The Petitioner, on his three previous trips before the Grand Jury, had invoked his privilege against self incrimination on some questions and had answered others. But in his last appearance, the court directed that only six questions be asked and none others. The court had already determined that any other questions propounded by the prosecution in the Grand Jury room, was subject to the Petitioner's former claim of his fifth amendment privilege. The court in effect, told the U.S. Attorney that any questions other than these six, if answered would violate the petitioner's fifth amendment privilege. It cannot be questioned that the U.S. Attorney violated the direct order of the court before the grand jury. The Petitioner was questioned about the very docu-

ments relating to the three automobiles in the indictment. The questions were asked as to entries on these documents, which violated the court's order that the Petitioner was not required to answer any questions pertaining to individual entries on any documents produced to him. These very documents were used in the government's case at trial and the petitioner's motion to suppress these documents was denied. The Petitioner was asked questions about his dealings with Jackie Brandon, who the Petitioner testified actually owned the automobiles at the time they were inventoried on December 13, 1976, by FBI agents. The Petitioner was questioned about other employees who worked for him and numerous other questions in direct disobedience to the court's order.

Chief Justice Berger, in the case of U. S. v. Mandujano, 425 U. S. 564, 48 L. Ed. 2d 212, 96 S. Ct. 1768, stated at 96 S. Ct. page 1778:

> "Under Miranda, a person in police custody has, of course, an absolute right to decline to answer any question, incriminating or innocuous, see Michigan v. Mosley, 423 U. S. 96, 46 L. Ed. 2d 313, 96 S. Ct. 321 (1975), whereas a grand jury witness, on the contrary, has an absolute duty to answer all questions, subject only to a valid fifth amendment claim. And even when the grand jury witness asserts the privilege, questioning need not cease, except as to the particular subject to which the privilege has been addressed. Cf. id., at 103-104, 46 L. Ed. 2d 313, 96 S. Ct. 321. Other lines of inquiry may properly be pursued."

The Court at 96 S. Ct. at page 1776 stated:

> "The stage is therefore set when the question is asked. If the witness interposes his privilege, the grand jury has two choices. If the desired testimony is of marginal value, the grand jury can pursue other avenues of inquiry; if the testimony is thought sufficiently important, the grand jury can seek a judicial determination as to the bona fides of the witness's fifth amendment claim. (Citing Cases), in which case the witness must satisfy the presiding judge that the claim of privilege is not a subterfuge. If in fact 'there is reasonable ground to apprehend danger to the witness from his being compelled to answer,' (Citing Cases), the prosecutor must then determine whether the answer is of such overriding importance as to justify a grant of immunity to the witness."

This case goes far beyond the court's guidelines in Mandujano, *supra*. The petitioner when he was in the grand jury room, with twenty three grand jurors, a court reporter and two assistant U.S. Attorneys, went ahead and answered the questions which the court had specifically prohibited in its order. The government cannot contend that the Petitioner, by not interposing his grounds of privilege, has waived his rights. The court in its order, had interposed the petitioner's fifth amendment rights to any questions other than the six, which it authorized to be asked. If ever there was a violation of the due process clause and the overriding of the petitioner's right not to incriminate himself, this case is the shining example. The U.S. Attorney's office, in spite of the court's ruling, proceeded to use

the Grand Jury as an investigative tool in order to convict the petitioner. The motion to suppress all documents and evidence relating to the three Oldsmobiles in the three count indictment should have been suppressed and not been admissible in the trial of this action.

WHEREFORE, THE PETITIONERS REQUEST this court that a Writ of Certiorari be issued to the United States Court of Appeals for the Sixth Circuit, reversing their decision in this case.

E. W. RIVERS
Suite 801
Citizens Bank Building
Paducah, KY 42001

Attorney for Petitioners